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No. 79-5885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DANIEL JOSEPH PORTLEY, PETITIONER

v.

LAWRENCE GROSSMAN, WARDEN, and
UNITED STATES PAROLE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1979. A petition for rehearing was denied on December 6, 1979. On January 3, 1980 the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a full and timely parole revocation hearing.

2. Whether the United States Parole Commission had jurisdiction to execute a warrant against petitioner for violation of his parole.

3. Whether the Parole Commission improperly considered petitioner's 1972 conviction for interstate transportation of a stolen motor vehicle as a basis for revoking petitioner's parole.

4. Whether application of the Parole Commission's parole release guidelines to petitioner who was sentenced prior to the effective date of the guidelines is an unconstitutional ex post facto enhancement of a criminal sentence.

STATEMENT

1. Upon his plea of guilty on September 27, 1971, petitioner was convicted in the United States District Court for the Central District of California of forgery and uttering a forged check, in violation of 18 U.S.C. 495, and unlawful possession of stolen mail, in violation of 18 U.S.C. 1708, and was sentenced to 10 years' imprisonment. The sentence was suspended and petitioner was placed on probation. On April 6, 1972, petitioner's probation was revoked after he was convicted of interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312 (the Dyer Act). Petitioner's original ten-year forgery and possession of stolen mail sentence was modified to six years, and he was sentenced to a concurrent term of four years' imprisonment for the Dyer Act conviction. Petitioner's sentences would have expired on February 16, 1978 (Pet. App. B2).

On July 1, 1974, petitioner was released on parole. On March 30, 1977, while on parole, he was arrested by California state authorities and charged with assault with a deadly weapon. Petitioner pleaded guilty to the misdemeanor offense of drawing and exhibiting a firearm, and was fined $100 and placed on three years' probation (ibid.). His federal parole status remained unchanged.

On August 25, 1977, petitioner was again arrested by California authorities and charged with receiving stolen property and possessing a firearm (ibid.). Four days later, on August 29, 1977, a federal parole violator warrant was issued based on petitioner's June 21, 1977, conviction for drawing and exhibiting a firearm (ibid.). Nine months later, petitioner pleaded guilty to three counts of burglary arising out of the August 25 arrest and was sentenced on May 30, 1978, to five years' probation (id. at B2-B3). The next day, the August 29 federal parole violator warrant was executed and petitioner, who had been held in state custody since prior to the issuance of the warrant, was taken into federal custody (C.T. 50, 56). Nine days later, on June 9, 1978, a supplemental parole warrant was issued based on petitioner's burglary conviction (Pet. App. B3).

On June 20, 1978, a parole revocation hearing was held at which petitioner admitted committing the state offenses, and introduced evidence of mitigating circumstances (C.T. 47-49). Based on the convictions and petitioner's admissions, the Commission revoked his parole (C.T. 55-56).[1/]

2. On July 27, 1978, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2255, alleging that he was not afforded a full and timely parole revocation hearing, that in revoking his parole the Parole Commission improperly considered his 1972 Dyer Act conviction, that in computing his parole violator term the Parole Commission improperly failed to credit the time he spent in state custody, and that the Parole Commission's use of parole guidelines not in force at the time he was sentenced was an unconstitutional ex post facto enhancement of his sentence.

1/ Petitioner's mandatory release date is May 5, 1980, and his presumptive parole date is April 1, 1980.

A United States Magistrate for the Central District of California recommended that petitioner be granted relief on his ex post facto claim and that his other contentions be rejected (Pet. App. B1-B18). The district court adopted the magistrate's recommendations and ordered the Parole Commission to "reconsider and determine petitioner's eligibility for reparole under the standards for reparole in effect when petitioner was sentenced in April, 1972." (C.T. 121). Both petitioner and the government appealed. The court of appeals reversed so much of the district court's order as granted petitioner relief and affirmed the denial of relief in all other respects (Pet. App. A1-A2).

ARGUMENT

1. Petitioner contends that he was denied a full and timely parole revocation hearing. Specifically, he argues (Pet. 13-15) that the 69-day delay from the time of his June 21, 1977, conviction to the issuance of the parole violator warrant on August 29 contravenes the mandate of 18 U.S.C. 4213 and 28 C.F.R. 2.44 that such warrants be issued "as soon as practicable" after discovery of the alleged violation; that the one year delay between his June 21, 1977, conviction and the June 20, 1978, parole revocation hearing violated his rights under the Due Process Clause and 18 U.S.C. 4214(a)(1)(B) (Pet. 15-24); and that the June 9, 1978, supplemental parole violator warrant did not afford him notice sufficient to prepare a defense at his June 20, 1978, parole revocation hearing (Pet. 24-28). These contentions were properly rejected below.

a. As the magistrate correctly observed (Pet. App. B6), 18 U.S.C. 4214 and its implementing regulations provide "no requirement as to when a parole violator warrant must be filed." In determining when to issue a warrant, the Parole

Commission is permitted, indeed encouraged, to stay its hand if doubt exists as to the gravity of the alleged violation. Thus 28 C.F.R. 2.44(b) provides in relevant part that:

> Any summons or warrant under this section shall be issued as soon as practicable after the alleged violation is reported to the Commission, except when delay is deemed necessary. Issuance of a summons or warrant may be withheld until the frequency or seriousness of violations, in the opinion of the Commission, requires such issuance * * *.

It is therefore apparent that the Parole Commission acted well within its discretion in not issuing a warrant until after petitioner was arrested a second time on August 25, 1977. Indeed, the Parole Commission's reluctance to issue a warrant until it was assured that petitioner's June 21 conviction was part of a pattern of serious violations, rather than an isolated act of misconduct, protected petitioner's interests in minimizing the likelihood of a premature and unwarranted revocation of his parole.

b. Nor was the hearing that followed the eventual execution of the warrant untimely. Petitioner's assertions to the contrary notwithstanding, 18 U.S.C. 4214(a)(1)(B) does not require that a parole revocation hearing be held within 60 days of the event said to justify revocation. Rather, under that provision a revocation hearing must be held within 60 days of a preliminary hearing at which probable cause for parole revocation is found. Here there was no preliminary hearing. Petitioner's conviction itself established probable cause. See 18 U.S.C. 4214(b)(1). In such circumstances, the time period within which a parole revocation hearing must be held is 90 days rather than 60, and does not begin to run

until the parolee is taken into custody pursuant to a parole violator warrant. See 18 U.S.C. 4214(c). As the magistrate stated (Pet. App. B6):

> While [18 U.S.C.] 4214(a)(1)(B) states that a revocation hearing must be held within sixty days of a determination of probable cause, this requirement is subject to the exception provided under subsection (c), which states in pertinent part: "Any alleged parole violator who is summoned or retaken by warrant under section 4213 * * * shall receive a revocation hearing within ninety days of the date of the retaking." (emphasis added).
>
> The petitioner was not retaken under the August 29, 1977, parole violator warrant until May 31, 1978. * * * The parole revocation hearing which was held on June 20, 1978, was clearly within the ninety day time limit prescribed by 4214(c). Thus, petitioner is incorrect in claiming that the hearing was not timely. 2/

2/ Petitioner contends (Pet. 15-20) that 18 U.S.C. 4214(c) must be read in conjunction with 18 U.S.C. 4214(b)(1), which provides not only that conviction for a crime while on parole constitutes probable cause for a parole violation but also that "[i]n cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons * * * may be placed against him as a detainer." In essence, petitioner argues that the 90-day time limit fixed by subsection(c) "is only applicable if the two requirements for a retaking under subsection b(1) are present" (Pet. 19). Since he was placed on probation for his state offenses and was therefore not "serving a new sentence in any institution," continues petitioner, subsection (b)(1) was not satisfied and therefore subsection (c) was inapplicable. This argument rests on a false premise. 18 U.S.C. 4214(b)(1), insofar as it relates the circumstances under which a detainer may be placed and the manner in which placement can be reviewed, does not fix a "requirement for a retaking" and therefore is not a condition precedent to the running of the 90-day time limit of subsection (c). Indeed, subsection (c) plainly provides that the timeliness of a revocation hearing is to be measured from the point at which the parolee is taken into custody pursuant to a warrant--not from the point at which a detainer is placed. Moreover, petitioner's argument, if successful, would not entitle him to prevail; rather, the Parole Commission would be left with no limitation on the time within which it must commence a hearing.

The fact that the Parole Commission deferred execution of the warrant and the parole revocation hearing that followed until after all of the intervening criminal charges were disposed of on May 30, 1978, does not dictate a different result. As the magistrate observed (Pet. App. B10): "Under [28] C.F.R. 2.44 (b), the warrant need not have been issued until after the petitioner's conviction for the burglary charges; since that Section provides in part that 'issuance of a summons or warrant may be withheld, or a warrant may be issued and held in abeyance pending disposition of the charge.' (Emphasis added)." Furthermore, the deferral of petitioner's parole revocation hearing until June 20, 1978, three weeks after he was taken into federal custody pursuant to the parole violator warrant, fully comported with due process. As this Court held in Moody v. Daggett, 429 U.S. 78, 87 (1976), the loss of liberty that triggers due process concerns does not occur until a parolee is taken into custody by execution of a parole violator warrant.3/

c. We rely upon the magistrate's disposition of petitioner's claim (Pet. 25) that the issuance of a supplemental parole violator warrant 11 days prior to his revocation hearing deprived him of adequate time to prepare

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3/ Petitioner claims (Pet. 21-22) that Moody v. Daggett is distinguishable because in that case the parolee was serving an intervening sentence at the time the detainer was lodged, whereas here petitioner was being held in state custody awaiting trial, and could have been released on bail absent the detainer. However, as this Court observed in Moody (429 U.S. at 80 n.2), a detainer is merely an administrative mechanism employed to assure that an inmate or detainee will not be released until the jurisdiction asserting a parole violation at least has an opportunity to act. A detainer does not require, or even suggest, that a parolee in state custody not be admitted to bail. A state that elects to release a parolee on bail (or for any other reason) can satisfy a detainer by merely notifying the lodging jurisdiction of its intent. Thus, if petitioner was in fact placed on no-bail status, "his remedy was to seek release on bond from the [court in which his trial was pending], and, if necessary, to appeal any improper refusal to grant such release." Ellis v. Chappell, 230 F. Supp. 164, 167 (D. D.C. 1964), aff'd by order, No. 18763 (D.C. Cir. Jan. 26, 1965).

his defense (Pet. App. 10-12). 4/

2. Petitioner's argument that the Parole Commission had no jurisdiction to execute the parole violator warrant and retake him on May 31, 1978, three and one-half months after his initial sentence expiration date, is without merit. The parole violator warrant was issued well before the expiration date. 28 C.F.R. 2.44(d) provides:

> The issuance of a warrant under this section suspends the running of a sentence until such time as the parolee may be retaken into custody and a final determination of the charges may be made by the Commission.

Thus, as long as a parole violator warrant is issued within the original sentence term, it may be executed after the specified expiration date. See, e.g., Barr v. Parker, 453 F.2d 865, 866-867 (9th Cir. 1971); Shelton v. United States Board of Parole, 388 F.2d 567, 570-571 (D.C. Cir. 1967). See also Zerbst v. Kidwell, 304 U.S. 359 (1938).

3. The magistrate properly rejected petitioner's claim that he is entitled to an evidentiary hearing to determine whether the Parole Commission improperly considered his 1972 Dyer Act conviction, finding it "clear" that the Parole Commission did not consider the Dyer Act conviction in the revocation hearing (Pet. App. B13). Both the district court and the court of appeals agreed. Further review of this fact-bound issue is unwarranted. Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967).

4/ Petitioner asserts (Pet. 25) that although the application for the warrant issued 11 days before the hearing, he "was not served or apprised of the additional charges until a few days prior to the revocation hearing." However, he offers no support for this statement except to cite to similar assertions in his submissions below. The supplemental warrant itself, as it is reprinted in the record (C.T. 57), does not indicate when it was served. In any event, the magistrate's findings would apply equally to a warrant served "a few days prior to the hearing" as to a warrant served 11 days before the hearing.

4. Finally, petitioner's contention that the Parole Commission's application of parole release guidelines not in effect when petitioner was sentenced violates the constitutional prohibition against ex post facto laws raises a question presented to this Court in United States Parole Commission, et al v. Geraghty, No. 78-572, argued October 2, 1979. For the reasons stated in our brief in Geraghty, we do not believe that the manner in which petitioner's parole eligibility date was set constitutes an unconstitutional ex post facto enhancement of his sentence.[5/] However, the Court may wish to hold the decision in this case in abeyance until it decides Geraghty.

CONCLUSION

The question whether the parole release guidelines were properly applied to petitioner should be decided in light of the Court's decision in Geraghty. The petition for a writ of certiorari should be denied in all other respects.

Respectfully submitted.

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5/ We are sending counsel for petitioner a copy of our brief in Geraghty.